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VIA E-MAIL AND U.S. MAIL

Robert J. V. Vose
Kennedy & Graven
470 US Bank Plaza
200 S. 6th Street
Minneapolis, MN 55402

Re: Frontier Communications Application for Cable Franchise in Farmington, MN

Dear Mr. Vose:

We write on behalf of Charter Communications ("Charter") to address important legal issues raised in connection with Frontier Communication's application for a competitive cable franchise with the City of Farmington ("City") and the City's Notice of Intent to Consider Issuance of Cable Franchise ("Notice").

First, the City's Notice inaccurately states that Charter's franchise expired at the end of 2015, suggesting that the City may not be bound to consider and comply with the terms and conditions of Charter's current franchise when it evaluates Frontier's application. Charter has properly triggered its right to rely on the federal Cable Act's franchise renewal procedures and protections, and, as a consequence, Charter's franchise remains in full force and effect. The Cable Act confirms Charter's authority to operate under its existing franchise, enshrines its due process rights, and shields it from unfair franchise renewal practices by a local franchising authority.

Second, Frontier's application asks the City to flout its statutory obligations by repudiating the construction and competitive equity requirements in Minnesota state law. Yet the City has no authority to defy state law. If Frontier believes state law to be preempted, it must take that issue up with the state through the courts. The City's role is to follow its statutory obligations, not to champion Frontier's private interests.

While Charter appreciates that it is the City's task to evaluate Frontier's application, the City must do so in light of Charter's valid franchise and the requirements of Minnesota law. That means the City cannot deem Charter's franchise to be expired. The City instead must use Charter's franchise as the baseline against which it evaluates Frontier's application. Failure to do so would both violate state law and breach Charter's franchise.

I. Charter's Franchise Remains Valid And In Effect Under Controlling Federal Law.

By asserting that Charter's franchise expired at the end of 2015, the Notice wrongly implies that the City may have latitude to set aside its obligation under Minnesota Statutes Section 238.08 to assess Frontier's application against the terms and conditions of Charter's existing franchise. Section 2.3.c. of Charter's franchise requires the City to grant additional cable franchises on "substantially similar substantive terms and conditions." The City has no latitude to ignore these obligations, because the federal Cable Act's renewal protections confirm that Charter's franchise remains in full force and effect. The City must abide its statutory and contractual obligations by evaluating Frontier's application in light of Charter's existing and valid franchise.

The City's Notice suggests a basic misunderstanding of the Cable Act's renewal process and protections. Section 626 of the Act establishes the substantive and procedural due process protections afforded to cable operators who timely invoke the Act's formal renewal process, as Charter has done here. That process requires a franchising authority to follow specific procedures before it may deny renewal. *See* 47 U.S.C. § 546(a)-(g). "[A] cable operator whose past performance and proposal for future performance meet the standards established by [Section 626 must] be granted renewal." H.R. Rep. No. 98-934, 98th Cong., 2d Sess. ("1984 House Report") at 72-73. As Congress explained, these protections serve the important policy objectives of "encourag[ing] investment by the cable operator at the time of the initial franchise and during the franchise term . . . [and] ensur[ing] such investment will not be jeopardized at franchise expiration." *Id.* at 72. And they provide "stability and certainty" for the cable operator at renewal time, *id.* at 22, by establishing "procedures and standards to protect the cable operator from unfair renewal practices." 130 Cong. Rec. H10427, H10436 (Oct. 1, 1984) (statement of Rep. Wirth). The Act creates "a significant federal law property expectation in the renewal of a franchise" that receives due process protection. *East. Telecom. Corp. v. Borough of East Conemaugh*, 872 F.2d 30, 35 (3d Cir. 1989).

To secure these protections and achieve their animating policies, a cable operator that invokes Section 626 has the right to continue operating under the terms of its prior franchise until a final decision on renewal has been made (and upheld on appeal, if applicable). *See, e.g., Rolla Cable Systems, Inc., v. City of Rolla*, 745 F. Supp. 574, 575-76 (E.D. Mo. 1990); *Comcast of California v. City of Walnut Creek*, 371 F. Supp. 1147, 1155 (N.D. 2005). A franchising authority must "continue to honor the original franchise agreement pending completion of the Section [626] process" because the franchising authority "controls the length of time the renewal process will take and determines whether the process will be completed by the time the franchise expires." *Walnut Creek*, 371 F. Supp. at 1155. This right to continue operating is assured where the operator has continued to perform its obligations and the franchising authority has continued to accept the benefits of that performance. *See Rolla Cable Systems, Inc.*, 745 F. Supp. at 575-76 ("In relying on the validity of the agreement, both the City and cable company performed and reaped the benefits of the agreement.").

Because Charter triggered its Section 626 rights, the City "cannot . . . claim" that Charter, "for purposes of the [federal Cable] Act, [is] not operating under a valid franchise in providing cable services so as to preclude it the protections of the Act." *Id.* The Cable Act thus obligates the City to honor Charter's original franchise terms until the conclusion of the Section 626 process, even after the termination date

specified in the franchise or any extensions between the parties. The City also must honor the competitive equity protections under Minnesota law and Section 2.3.c. of Charter's franchise when considering Frontier's application.

II. The City Must Comply With State Law.

Minnesota state law defines and circumscribes municipal authority to grant cable franchises. *See* Minn. Stat. 238.01 *et seq.* All franchises granted pursuant to state law must contain "a provision that the franchise . . . compl[ies] with the Minnesota franchise standards contained in [Section 238.084]." Those standards require a schedule showing commencement of construction within 240 days, a reasonable rate of construction, and substantial completion of construction "throughout the authorized franchise area . . . within five years of the granting of the franchise." Minn. Stat. 238.084(m)(1)-(3). State law also forbids the City from "grant[ing] an additional franchise for cable service for an area included in an existing franchise on terms and conditions more favorable or less burdensome than those in the existing franchise pertaining to: (1) the area served; (2) public, educational, or governmental access requirements; or (3) franchise fees." *Id.* 238.08(1)(b).

Charter's existing franchise complies with Minnesota state law and identifies the authorized franchise area as the City's corporate boundaries. Franchise at 1 & § 2.8. In Section F of its application, however, Frontier asks the City not to require it to provide coverage throughout Frontier's service area in the City, or to specify a schedule for construction or require completion of construction within 5 years. Frontier's application acknowledges that the franchise terms it seeks would be less burdensome than the requirements imposed on Charter, and that the City would violate state law if it were to grant the franchise Frontier requests. While Frontier attempts to assuage the City with a five page argument about federal preemption, it nowhere addresses the fundamental question the City must ask: May the City repudiate state law or declare it to be invalid? The answer is no.

Minnesota municipalities "have no inherent powers and possess only such powers as are expressly conferred by statute . . . ." *City of Morris v. Sax Investments, Inc.*, 749 N.W.2d 1, 6 (Mn. 2008) (quoting *Mangold Midwest Co. v. Village of Richfield*, 143 N.W.2d 813, 820 (Mn. 1996)). The state "may limit the power of a city to act in a particular area." *Id.* The state also may "fully occupy a particular field of legislation so that there is no room for local regulation." *Mangold*, 143 N.W.2d at 819. Where the state has limited the City's power and occupied a particular field, as it has with cable franchise regulation, the City "cannot enact a local regulation that conflicts with state law." *Sax Investments*, 749 N.W.2d at 6; *see also State v. Steele Cnty. Bd. of Comm'rs*, 232 N.W. 737, 738 (Mn. 1930) ("[Local officials'] authority is the command of the statute, and it is the limit of their power.").

Minnesota's cable franchising provisions do not allow the City discretion with respect to construction requirements or competitive equity. The statute specifies that any franchise granted by the City "***shall*** comply with the Minnesota franchise standards" and "***shall***" include terms related to area served that are no "more favorable or less burdensome" than an existing franchise. Minn. Stat. 238.08 & 238.084 (emphasis added); *see Madson v. Overby*, 425 N.W.2d 270, 277 (Mn. Ct. App. 1998) (statute directing that cities "shall" take specified action "is mandatory" and "does not involve discretion"). The City cannot "refuse to perform" its duty "on the ground that the existing law is [invalid]." *Steele Cnty.*, 232

N.W. at 738. And the City is "not clothed with judicial authority" to declare a state law invalid. *Id.* If the City were to assert that authority and disavow its statutory obligations, its action would be "*ultra vires*, beyond the limits of the power granted to [it], and . . . without legal force or effect." *Lilly v. City of Minneapolis*, 527 N.W. 2d 107, 113 (Mn. Ct. App. 1995).

Nor should the City accept Frontier's invitation to assume the substantial cost and risk of adopting Frontier's federal preemption argument. *See Steele*, 232 N.W. at 738 (holding that attacks on the validity of a statute should be leveled by the private interests "asserting invalidity" who are "peculiarly and particularly affected thereby," not by cities or public officials). Frontier acknowledges that whether a state law is preempted "is a matter of judgment," App. at 12, which, as discussed above, Minnesota's cable franchising law does not afford to municipalities. Even if the City were able or inclined to assume that mantle, Frontier has fallen far short of establishing that the requirements of Minnesota law would create an actual barrier to entry for Frontier in the City, particularly in light of Frontier's substantial resources and existing plant in the City. If Frontier believes the state law to be preempted, Frontier must make its case in the courts, not ask the City to spurn its statutory obligations.

For the reasons stated above, the City must consider Frontier's application against the requirements of state law and Charter's valid franchise. The City ultimately may not grant a franchise to Frontier that violates state law or imposes terms that are more favorable or less burdensome than the terms contained in Charter's franchise.

Sincerely,

Gardner F. Gillespie
J. Aaron George
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

GFG/gs

cc: Councilmember Jason Bartholomay
Councilmember Douglas Bonar
Councilmember Terry Donnelly
Councilmember Tim Pitcher
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